Supreme Court, U.S.
FILED
041275 MAR 17 2005
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

GREGORY BRUCE DUNAGAN,
Petitioner,

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals apply the wrong standard in denying Gregory Bruce Dunagan's request for a certificate of appealability after Dunagan made a substantial showing that he was denied his right to the effective assistance of counsel when his trial attorneys failed to effectively challenge the eyewitness testimony offered at Dunagan's trial especially in light of the fact that the eyewitness testimony was the only evidence to connect Dunagan to the offense on trial?

II. Is the standard for evaluating ineffective assistance of counsel different post-AEDPA than pre-AEDPA?

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Gregory Bruce Dunagan, Petitioner, hereby petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Fifth Circuit (entered November 23, 2004) denying Petitioner's request for a certificate of appealability from the district court's denial of Petitioner's federal habeas petition brought pursuant to 28 U.S.C. § 2254.

ORDERS BELOW

The unreported Findings and Recommendation of the United States Magistrate Judge recommending that Petitioner's request for a writ of habeas corpus be conditionally granted may be found in Appendix C. The unreported Memorandum Opinion and order of the United States District Judge rejecting the recommendation of the Magistrate Judge and denying Petitioner's request for habeas corpus relief is in Appendix D. The unreported order of the district court denying Petitioner's application for a certificate of appealability is in Appendix E. The order of the United States Court of Appeals for the Fifth Circuit denying Petitioner's request for a certificate of appealability is in Appendix A and is not reported. The unreported order of the United States Court of Appeals denying Petitioner's motion for rehearing is in Appendix B.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Fifth Circuit denying Petitioner's request for a certificate of appealability was entered on November 23, 2004. A petition for panel rehearing was denied on December 21, 2004. This Court has jurisdiction of this case pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution reads, in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.

U. S. CONST., amend. VI.

Section 2253 of Title 28 of the United States Code reads, in pertinent part, as follows:

> . . .
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court;
>
> . . .
>
> (2) A certificate of appealability must issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253.

STATEMENT OF THE CASE

Procedural History

Gregory Bruce Dunagan was indicted by a Dallas County, Texas grand jury for the offense of capital murder. (CR[1]: 2). Dunagan entered a plea of "not guilty" to the indictment and proceeded to trial before a jury. (RR[2] 6: 10). The jury found Dunagan guilty as charged in the indictment. (CR: 91). Then, because the state did not seek the death penalty, the trial judge assessed Dunagan's punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for life. (CR: 97-99).

Dunagan's motion for new trial was overruled by the trial judge. (CR: 101). Dunagan then gave timely notice of appeal to the Court of Appeals for the Fifth District of Texas. (CR: 102). On November 9, 2000, that court affirmed Dunagan's conviction. *Gregory Bruce Dunagan v. The State of Texas*, 2000 WL 1678400 (Tex. App. - Dallas 2000). On January 10, 2001, the Court of Appeals overruled Dunagan's motion for rehearing. On June 20, 2001, the Texas Court of Criminal Appeals refused Dunagan's petition for discretionary review. (Vol.[3] 1: 9).

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[1] CR refers to the clerk's record from the state appellate proceedings.

[2] RR refers to the reporter's record from the state appellate proceedings. The number following is the volume number.

[3] Vol. refers to the record in the court below. The number following is the volume number.

On February 19, 2002, Dunagan filed an application for a writ of habeas corpus in the Criminal District Court No. 3 of Dallas County, Texas alleging that his trial attorney did not render effective assistance of counsel. On October 30, 2002, the Court of Criminal Appeals denied, without written order, that application. (Vol. 1: 9-10).

On February 20, 2003, Dunagan filed a Petition for a Writ of Habeas Corpus by a Person in State Custody in the United States District Court for the Northern District of Texas pursuant to 28 U.S.C. § 2254. (Vol. 1: 7). On November 4, 2003, United States Magistrate Judge Jeff Kaplan filed his Findings and Recommendation of the United States Magistrate Judge in which he recommended that Dunagan's petition for a writ of habeas corpus be conditionally granted because Dunagan's trial attorney did not provide Dunagan with effective assistance of counsel. (Vol. 1: 64-81). Doug Dretke timely filed objections to the Magistrate Judge's recommendation. (Vol. 1: 84-94). On April 28, 2004, United States District Judge Sidney Fitzwater rejected the Magistrate Judge's recommendation and entered judgment denying and dismissing Dunagan's petition for a writ of habeas corpus. (Vol. 1: 100-122).

Dunagan gave timely notice of appeal from the judgment entered by the District Judge. (Vol. 1: 130). The District Judge, however, denied Dunagan's request for a certificate of appealability. (Vol. 1: 128). Dunagan then sought a certificate of appealability from the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 2253. The Court of Appeals denied that request and denied Dunagan's petition for a panel rehearing. *Dunagan v. Dretke*, No. 04-10622 (5th Cir. November 23, 2004 and December 21, 2004).

Statement of Facts

Early in the morning of February 7, 1997, two men entered Barkat Ali's convenience store. One of the men shot and killed Ali in view of his wife, Ishrat Khan. (RR 6: 19, 44-72, 92, 114, 126, 142; RR 7: 28-44). The other man then pointed a gun at Khan and demanded money from the cash register. (RR 6: 107). Khan removed the cash register drawer and gave it to the man. (RR 6: 107). While the gunmen were still in the store, Vladimir Frank Kubala, the proprietor of a nearby business entered the store. Almost immediately one of the gunmen fled. (RR 6: 22, 41-89). Kubala saw only a blur rushing past him. He could not tell if the blur was male or female. (RR 6: 52-53). As the blur vanished, a man threatened Kubala with a gun and made him kneel on the ground. (RR 6: 51-89). The man then walked past Kubala and out of the store. (RR 6: 59-60). Kubala called the police. (RR 6: 60).

According to the police report, Ishrat Khan and Vladimir Frank Kubala were able to give only very limited descriptions of the suspects. (See Ex. G attached to the Memorandum in Support of Petition for a Writ of Habeas Corpus). Television news reports following the murder show a police detective talking about the suspects wearing bandanas. Those reports also show Kubala talking about his limited opportunity to identify the suspects. (See Exs. H and I attached to the Memorandum). Approximately a year and a half after the offense, however, Kubala identified Dunagan from a photo line-up as the person who threatened him with a gun. (RR 6: 75-85; 168-175). Khan was unable to pick Dunagan's photo out of a photo line-up. (RR 6: 183).

There was no physical evidence such as blood, hair, fibers, or fingerprints to connect Dunagan to the offense. (RR

6: 154). Nor did Dunagan confess. The case turned entirely on shaky eyewitness testimony. Nevertheless, based on the identification made by Kubala 18 months after the offense, Dunagan was arrested.

The affidavit filed in support of the arrest warrant for Dunagan says that one of the suspects was behind the counter of the store taking money out of the cash register opened by Ishrat Khan when Vladimir Frank Kubala entered the store. According to the affidavit, that man pointed a gun at Kubala and made Kubala get down while the man exited the store. The affidavit says this is the man Kubala identified approximately 18 months after the offense. (See Ex. J attached to the Memorandum).

Khan and Kubala were both called as witnesses at Dunagan's trial. During Kubala's testimony he identified Dunagan as the person he saw behind the counter with Ishrat Khan. According to Kubala, this man pointed a gun at him. (RR 6: 87-88). Ishrat Khan, however, after first identifying someone in the audience of the courtroom as the person who shot her husband, identified Dunagan as the shooter. (RR 6: 106; RR 7: 29-30). According to Khan, it was the shooter's accomplice and *not* the shooter who approached her and took the money out of the cash register. (RR 6: 106; RR 7: 44-45). It thus appears that while Khan and Kubala both identified Dunagan in court as being involved in the shooting of Barkat Ali, Khan was identifying Dunagan as the person who shot her husband and not the person who took the money from the cash register and Kubala was identifying Dunagan as the accomplice who took money from the cash register.

This eyewitness confusion was confirmed by post-trial interviews of Ishrat Khan and Frank Kubala. Khan, in her interview, said the man who shot her husband wore a bandana

across his face. According to Khan, she was able to eventually identify Dunagan at trial, despite the bandana, by his eyes. Khan said in the interview that the man who robbed her did not have a bandana across his face. (See Ex. K attached to the Memorandum). Frank Kubala related in a post-trial interview that the person he was able to identify was not wearing a bandana. (See Ex. L attached to the Memorandum). In other words, the person he saw is the person who Khan says robbed her and *not* the person who Khan says shot her husband. This simply confirms what is clear from the arrest affidavit, police report, and the trial testimony, Kubala and Khan identified different suspects as the same person in front of the jury.

Dunagan's trial attorneys were in possession of the police report, arrest affidavit, and tapes of the television news reports broadcast after the murder. Yet, the attorneys did not cross-examine either of the police witnesses who testified at Dunagan's trial, Marc Taddonio or Alan Patton, about the suspects wearing bandanas, about the limited descriptions of the suspects given by the eyewitnesses, or about the eyewitnesses identifying Dunagan as different suspects in the murder. In fact, Dunagan's attorneys did not cross-examine the police witnesses at all. (See, RR 6: 40, 185). Nor did the attorneys cross-examine Kubala or Khan about whether the suspects wore bandanas, the limited descriptions of the suspects they gave to the police following the murder, or about why they were identifying Dunagan as different suspects in the murder. No evidence was presented to the jury about these matters. Not surprisingly, Dunagan was convicted of capital murder.

REASONS FOR GRANTING THE WRIT

Question I

Did the Court of Appeals apply the wrong standard in denying Gregory Bruce Dunagan's request for a certificate of appealability after Dunagan made a substantial showing that he was denied his right to the effective assistance of counsel when his trial attorneys failed to effectively challenge the eyewitness testimony offered at Dunagan's trial especially in light of the fact that the eyewitness testimony was the only evidence to connect Dunagan to the offense on trial?

Standard for Issuance of Certificate of Appealability

In order to appeal from the denial and dismissal of his §2254 petition, it is necessary for Dunagan to first obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). A certificate of appealability should issue if it is determined that Dunagan made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). This means that Dunagan "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

A court of appeals should not deny a request for a certificate of appealability "merely because it believes the applicant will not demonstrate an entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. at 337, 123 S.Ct. 1029. Rather, the court of appeals should conduct "an overview of the claims in the habeas petition and a general assessment of

their merits" and ask whether the resolution of those claims was "debatable amongst jurists of reason." 537 U.S. at 336, 123 S.Ct. 1029. "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims." *Id.* "Indeed, a claim can be debatable even though every jurist of reason might agree, after the certificate of appealability has been granted and the case has received full consideration, that petitioner will not prevail." 537 U.S. at 338, 123 S.Ct. 1029. "The petitioner must demonstrate [only] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, *supra*, 529 U.S. at 484, 120 S.Ct. 1595.

Denial of Constitutional Right

Dunagan raised only one issue in his §2255 petition, that he was denied his right to the effective assistance of counsel at his capital murder trial as guaranteed by the Sixth Amendment to the United States Constitution. Dunagan made a substantial showing of the denial of that right.

The right to assistance of counsel has long been understood to include a "right to effective assistance of counsel." *See*, *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 763 (1970). The integrity of our criminal justice system and the fairness of our adversary criminal process is assured only if an accused is represented by an effective attorney. *See*, *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 667, 66 L.Ed.2d 564 (1981). Absent the effective assistance of counsel, "a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Thus, a defendant is constitutionally entitled to have effective counsel acting in the role of an advocate. *See*, *Anders v. California*, 386 U.S. 738, 743, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

This Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) established the federal standard for determining whether an attorney rendered reasonably effective assistance of counsel. Pursuant to that test

> . . . the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. 2052. In other words, if the attorney's strategy is objectively unreasonable and that strategy undermines confidence in the outcome of the trial, the attorney should be found ineffective. *See*, *Strickland v. Washington*, 466 U.S. at 694, 104 S.Ct. 2052.

Dunagan's trial attorneys did not cross-examine the police witnesses called to testify at Dunagan's trial and failed to adequately cross-examine the two eyewitnesses called to testify at the trial. Because of those omissions, the jury did not hear about the suspects in the murder wearing bandanas, did not hear about the limited descriptions of the suspects given by the eyewitnesses following the offense, and did not hear that the two eyewitnesses were identifying Dunagan as different suspects in the murder. Dunagan's trial attorneys did not bring these facts out through examination of the witnesses nor did they point them out in final argument. Obviously, Dunagan's trial attorneys forgot that cross-

examination is "the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (quoting 5 Wigmore § 1367).

The entire case against Dunagan turned on eyewitness testimony. Yet, that testimony went unchallenged. There is simply no sound trial strategy that can be gleaned from not challenging by way of cross-examination the only evidence offered against Dunagan by the state. This strategy was not designed to yield some benefit or avoid some harm to the defense. *See*, *Moore v. Johnson*, 194 F.3d 586, 615 (5th Cir. 1999).

The Fifth Circuit, in a case very much like Dunagan's, *Beltran v. Cockrell*, 294 F.3d 730 (5th Cir. 2002), found the failure of an attorney to introduce evidence that would have undermined eyewitness testimony in a robbery/murder case to be unreasonable and ineffective. *Id.* at 735. The Fifth Circuit ignored its own precedent in denying Dunagan's application for a certificate of appealability. Likewise, the Fifth Circuit ignored precedents from other circuits finding attorneys ineffective for not challenging eyewitness testimony. *See*, *Matthews v. Abramajtys*, 319 F.3d 780 (6th Cir. 2003) and *Harris v. Artuz*, 2004 WL 1303649 (2nd Cir. June 14, 2004) (unpublished).

The bottom line is that the failure of Dunagan's trial attorneys to challenge the eyewitness testimony was objectively unreasonable. Because the eyewitness testimony was the only evidence that connected Dunagan to the offense the failure to contest the testimony undermines confidence in the outcome of Dunagan's trial.

The State Court Decision

The AEDPA limits the power of federal courts to grant writs of habeas corpus to those situations in which the state court's adjudication on the merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. §2254(d).

In applying the unreasonable application prong of 28 U.S.C. §2254(d), a federal court should inquire

> . . . whether the state court's application of clearly established federal law was objectively unreasonable. The federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner that the state court did in the habeas petitioner's case.

Williams v. Taylor, 529 U.S. 362, 409-10, 120 S.Ct. 1495, 1521-22, 146 L.Ed.2d 389 (2000). The state court determined that the strategy of Dunagan's trial attorneys was to "focus on the misidentification by the eyewitness(sic) and not open themselves up to having the jury discover [Dunagan's] previous aggravated robbery conviction." (See Ex. F attached to Memorandum). The state court found that counsel "did not cross-examine witnesses during the case in chief as he wanted the State's entire case cemented prior to cross-examining witnesses." According to the state court, Dunagan's trial attorneys followed a "sound trial strategy" in not cross-

examining the state's witnesses. The failure to challenge the eyewitness testimony presented by the state, according to the state court, "limited the state's ability to present rebuttal evidence." The state court found that Dunagan's attorneys "had a sound legal strategy for not presenting evidence in this case and for arguing the issue of misidentification."

The state court accepted that the strategy of Dunagan's trial attorneys of not cross-examining the state's witnesses was reasonable. The state court never considered whether the strategy was objectively reasonable. The failure to cross-examine almost all of the state's witnesses may have been a choice, but it was not reasonable. No experienced trial counsel would waive cross-examination of almost every state's witness, particularly when there are points to be made on cross. The failure to cross-examine the state's witnesses left undeveloped relevant issues that could have been used to undermine the identification of Dunagan.

Developing for the jury that the suspects in the robbery/murder wore bandanas, thus making it more difficult to identify them, would in no way have opened the door to Dunagan's prior conviction or other rebuttal evidence as feared by the state court. The jury, however, was never told anything about a bandana. The jury was simply allowed to believe that the eyewitness identification testimony was based on a clear view of Dunagan's face.

Similarly, the state court did not address the failure of Dunagan's trial attorney to establish for the jury that the state's two eyewitnesses identified Dunagan as different actors in the robbery/murder. If, as the state court found, the strategy of counsel was to focus on the issue of misidentification, it makes absolutely no sense to not develop all the problems with the identification testimony. There is

simply no objective, trial strategy reason for not presenting evidence to the jury about the bandana worn by at least one of the suspects and about the two eyewitnesses identifying Dunagan as different actors in the offense. *See*, *Strickland v. Washington*, 466 U.S. at 687-88, 104 S.Ct. at 2064 (representation must be judged by an objective standard of reasonableness).

The strategy identified by the state court of Dunagan's trial attorneys to focus on the misidentification of Dunagan was an appropriate strategy in theory, but it was pursued in an unreasonable manner. *See*, *Beltran v. Cockrell*, *supra*, *Matthews v. Abramajtys*, *supra*, and *Harris v. Artuz*, *supra*. The determination by the state court that Dunagan's trial attorneys were effective was an unreasonable application of the principles of *Strickland v. Washington*, *supra*.

The District Court Decision

The district court found the strategy pursued by Dunagan's trial attorneys to be reasonable for the same reasons the state court found it to be reasonable. The district court, like the state court, did not pause to consider whether the strategy was objectively reasonable. The district court labored under the misconception that cross-examination of the state's witnesses would somehow risk "highlighting unfavorable evidence." (Vol. 1: 115). The district court, however, like the state court, did not explain how this perceived horror would have occurred.

The district court spent a great deal of time pointing out the masterful job Dunagan's trial attorneys did in representing Dunagan (Vol. 1: 114-117) but never once addressed the case of *Beltran v. Cockrell*, *supra* that makes it abundantly clear

that the strategy the district court and the state court found to be reasonable was, in fact, not reasonable.[4]

When United States Magistrate Judge Jeff Kaplan reviewed this case he was "unable to discern any legitimate tactical reason for not cross-examining or otherwise questioning the only two eyewitnesses to the crime about the bandana worn by one of the suspects." (Vol. 1: 75). Magistrate Judge Kaplan correctly recognized that cross-examination on this issue would not have allowed the state to call rebuttal witnesses and would have had the benefit of impeaching already shaky identification testimony. (Vol. 1: 750). In fact, as Magistrate Judge Kaplan explained:

> The only viable defense available to petitioner was to somehow impeach the testimony of Kubala and Khan. This defense was seriously compromised when Baraka decided not to question these witnesses about the bandana worn by one of the suspects. While strategic decisions made by counsel after a thorough investigation of the law and the facts are presumed to be reasonable, "*Strickland* does not require deference to those decisions of counsel that, viewed in the light of the facts known at the time of the purported decision, do not survive any conceivable strategic purpose." *Moore v. Johnson*, 194 F.3d 586, 615-16 (5th Cir. 1999) (citing cases). Baraka's decision to ignore the bandana did not further any legitimate defense strategy. To the contrary, it left Kubala's

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[4] The district court did not cite *Beltran* because the district court apparently believes the test for ineffective assistance is somehow different under AEDPA than it was pre-AEDPA. (See, Vol. 1: 128). This is clearly wrong.

> testimony virtually unchallenged, a fact noted by the prosecutor during closing argument. (*See*, St. Trial Tr. - VII at 70). This amounts to deficient representation under *Strickland* and its progeny. *See*, e.g. *Beltran v. Cockrell*, 294 F.3d 703, 734-35 (5th Cir. 2002), *cert. denied*, 123 S.Ct. 871 (2003) (holding that counsel was ineffective for failing to challenge identification testimony of eyewitnesses).

(Vol. 1: 177; fn. 8 omitted which read as follows: In response to defense counsel's argument that there was a reasonable doubt as to identity, the prosecutor remarked, "I think they're trying to - from their argument, and *the lack of cross-examination*, that they're conceding everything we have to prove." (State Hab. Tr. - VIII at 70) (emphasis added)).

Magistrate Judge Kaplan goes on to note that once Dunagan's trial attorney decided to abandon his ill-advised strategy of not cross-examining the state's witnesses in order to cross-examine Khan, there was "no discernible strategic purpose for not questioning her about the bandana worn by one of the suspects." (Vol. 1: 78). This important piece of evidence could have been used to cast doubt on the identification of both Kubala and Khan. (Vol. 1: 78). Magistrate Judge Kaplan rightly found that Dunagan was prejudiced by his attorneys failure to effectively attack the eyewitness testimony, particularly in light of the evidence that the state's two eyewitnesses identified Dunagan as different actors in the robbery/murder. (Vol. 1: 77-78). Magistrate Judge Kaplan determined that Dunagan "was deprived of his Sixth Amendment right to effective assistance of counsel under *Strickland*." (Vol. 1: 79).

Unreasonable Application of *Strickland*

The district court valiantly tried to support the state court decision finding Dunagan's trial attorneys to be effective by ignoring similar cases such as *Beltran v. Cockrell*, *supra*, *Matthews v. Abramajtys*, *supra* and *Harris v. Artuz*, *supra*. The district court did this by giving the state court decision much more deference than it is due under AEDPA. This probably resulted from the belief of the district court that a *Strickland* analysis is somehow different under AEDPA than it was pre-AEDPA. If the district court had correctly applied *Strickland* to the facts of Dunagan's case, it would have been clear that Dunagan's trial attorneys provided ineffective assistance to Dunagan at his trial. The Magistrate Judge's opinion makes this obvious and AEDPA does not change this. The decision of the state court finding otherwise is, therefore, an unreasonable application of *Strickland*. It is simply not possible to find a *Strickland* violation and to then say that a state court decision finding no *Strickland* violation is a reasonable one. State court decisions finding attorneys to be effective under *Strickland* are regularly overturned by the federal courts. *See*, e.g. *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Young v. Dretke*, 356 F.3d 616 (5th Cir. 2004). The decision of the state habeas court upholding Dunagan's conviction should also be overturned because it, like those mentioned above, was an unreasonable application of the principles of *Strickland v. Washington*. The granting of a certificate of appealability is the first step toward achieving that result.

Denial of Certificate of Appealability

The district court denied a certificate of appealability in this case saying that Dunagan did not make "a substantial showing of the denial of a constitutional right." (Vol. 1: 128). The Fifth Circuit denied a certificate of appealability saying that "[j]urists of reason, applying the proper standard of review under 28 U.S.C. §2254(d) and *Strickland v. Washington*, 466 U.S. 668, 689 (1984), could not find the district court's decision debatable or wrong." *Dunagan v. Dretke*, No. 04-10622 (5th Cir. November 23, 2004). These conclusions, as demonstrated above, are wrong. The several appellate opinions Dunagan cited to the Fifth Circuit, *Beltran v. Cockrell*, *supra*, *Matthews v. Abramajtys*, *supra*, and *Harris v. Artuz*, *supra*, and the fact that United States Magistrate Judge Jeff Kaplan found Dunagan's trial attorneys to be ineffective means, at the very least, that jurists of reason could find the district court's decision debatable or wrong.

Dunagan made a substantial showing of the denial of a constitutional right. He is entitled to a certificate of appealability and then a full consideration of his ineffective assistance of counsel claim on appeal.

Question II

Is the standard for evaluating ineffective assistance of counsel different post-AEDPA than pre-AEDPA?

The standard for judging the effectiveness of counsel was established by this Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This standard was used for many years prior to the 1996 amendments to 28 U.S.C. § 2254 enacted as part of the Antiterrorism and Effective Death Penalty Act. This same

standard is used today post-AEDPA. *See, e.g. Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). The courts below, however, apparently labor under the misconception that the standard for judging the effectiveness of counsel is different under the AEDPA than it was before the AEDPA. United States District Judge Sidney Fitzwater made this mistake in denying Dunagan's request for a certificate of appealability when he said, in the order denying Dunagan's application: "In his application, petitioner maintains, *inter alia*, that the court 'ignored' *Beltran v. Cockrell*, 294 F.3d 730 (5th Cir. 2002), in its memorandum opinion and order. The court did not cite *Beltran* because it is a pre-AEDPA case and is clearly distinguishable on that basis." (Vol. 1: 128). The Fifth Circuit, *sub silentio*, approved this interpretation of AEDPA when it too denied Dunagan's request for a certificate of appealability without citing *Beltran*.

Beltran applied the standard enunciated in *Strickland* to find an attorney ineffective. The district court and the Fifth Circuit ignored this precedent because *Beltran* was not decided under the AEDPA. The amendments to 28 U.S.C. § 2254 enacted by the AEDPA, however, did not change the standard for judging the effectiveness of counsel. *Strickland* still applies. The courts below clearly do not understand how to judge the effectiveness of counsel in a post-AEDPA world. It is important for this Court to clarify and emphasize that *Strickland* is still the law and that the lower courts should apply *Strickland* in the same manner post-AEDPA as they applied it pre-AEDPA.

CONCLUSION

FOR THE ABOVE REASONS, Petitioner respectfully asks that this Court grant the writ of certiorari and, upon review of the decision below, summarily reverse the order of the United States Court of Appeals for the Fifth Circuit denying Petitioner's application for a certificate of appealability and remand to that court with directions that Petitioner's request for a certificate of appealability be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10622
USDC No. 3:03-CV-374-D

[Filed November 23, 2004]

GREGORY B. DUNAGAN,	)
Petitioner-Appellant,	)
	)
v.	)
	)
DOUG DRETKE, DIRECTOR,	)
TEXAS DEPARTMENT OF	)
CRIMINAL JUSTICE,	)
CORRECTIONAL INSTITUTIONS	)
DIVISION,	)
Respondent-Appellee.	)
	)

Appeal from the United States District Court
for the Northern District of Texas

ORDER

Gregory Dunagan, Texas prisoner no. 929358, is serving a life sentence for murder committed during an armed robbery. Dunagan seeks a certificate of appealability

("COA") from this court following the district courts denial of his federal habeas petition brought under 28 U.S.C. § 2254. Dunagan contends that his trial counsel rendered ineffective assistance by failing to cross-examine witnesses about a bandana worn by one of the robbers.

Jurists of reason, applying the proper standards of review under 28 U.S.C. § 2254(d) and Strickland v. Washington, 466 U.S. 668, 689 (1984), could not find the district court's decision debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). The motion for a COA is therefore DENIED.

/s/_____
E. GRADY JOLLY
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10622

[Filed December 21, 2004]

GREGORY B. DUNAGAN,
Petitioner-Appellant,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS
DIVISION,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Texas, Dallas

Before JOLLY, HIGGINBOTHAM, and BENAVIDES, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motion for certificate of appealability. The panel has considered appellant's petition for panel rehearing as a petition for reconsideration. IT IS ORDERED that the petition is DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 3-03-CV-0374-K

[Filed November 4, 2003]

GREGORY B. DUNAGAN, Petitioner,	)
v.	)
DOUG DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	)

FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Gregory Bruce Dunagan, by and through his counsel of record, has filed an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons stated herein, the application should be conditionally granted.

I.

Petitioner was convicted of capital murder and sentenced to life imprisonment.[1] His conviction and sentence were affirmed on direct appeal. *Dunagan v. State,* No. 05-99-01694-CR (Tex. App.– Dallas, Nov. 9, 2000, pet. ref'd). Petitioner also filed an application for state post-conviction relief. The application was denied without written order. *ExparteDunagan,* No. 52,271-01 (Tex. Crim. App. Oct. 30, 2002). Petitioner then filed this action in federal court.

II.

In his sole ground for relief, petitioner contends that he received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. More particularly, petitioner claims that his trial counsel was ineffective for: (1) failing to effectively cross-examine the state's witnesses; (2) not presenting critical alibi evidence to the jury; and (3) failing to object in a timely manner to evidence of an extraneous arrest.

A.

The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. That right is denied when the performance of counsel falls below an objective standard of reasonable professional conduct and thereby prejudices the defense. *Yarborough v. Gentry*, ____ S.Ct. ___, 2003 WL 22382563 at *2 (U.S. Oct. 20, 2003), *citing Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Prejudice results when "there is a

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[1] The state did not seek the death penalty.

reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland,* 104 S.Ct. at 2068. *See also Lockhart v. Fretwell,* 506 U.S. 364, 372, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993) (habeas petitioner must show that trial result was unreliable or proceeding fundamentally unfair due to deficient performance of counsel).

Where, as here, a state court has already rejected an ineffective assistance of counsel claim, a federal court may grant habeas relief only if the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law" or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) & (2); *see also Yarborough,* 2003 WL 22382563 at *2 (citing cases). The Supreme Court has made clear that the "unreasonable application" prong of section 2254(d)(1) permits a federal habeas court to "grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the petitioner's case." *Wiggins v. Smith,*___ U.S. ____, 123 S.Ct. 2527, 2534-35, 156 L.Ed.2d 471 (2003), *quoting Williams v. Taylor,* 529 U.S. 362, 413, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000). Stated differently, "a federal court may grant relief when a state court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced.'" *Id.,* 123 S.Ct. at 2535, *quoting Lockyer v. Andrade,* 538 U.S. 63,__, 123 S.Ct. 1166, 1175, 155 L.Ed.2d 144 (2003). In order for a federal court to find the state court's application of Supreme Court precedent "unreasonable," the state court decision must be more than incorrect or erroneous--the application of clearly established federal law must have been "objectively unreasonable." *Id.,*

citing Williams, 120 S.Ct. at 1523; *see also Gardner v. Johnson,* 247 F.3d 551, 560 (5th Cir. 2001).

B.

Petitioner was charged with knowingly and intentionally causing the death of Barkat Ali by shooting him with a firearm while in the course of committing or attempting to commit the offense of robbery. (St. App. Tr. at 2).[2] The shooting occurred shortly after 6:00 a.m. on February 7, 1997, when two African-American men entered the Eagle Mart Food Store, a convenience store in Grand Prairie, Texas operated by Ali and his wife, Ishrat Khan. One of the men, identified in the offense report as "Suspect 1," was approximately six feet tall, weighed 200 pounds, and had a thin mustache. (St. Hab. Tr. at 44). The other man, identified as "Suspect 2," was shorter and wore a bandana across his face. *(Id.).* Only two witnesses, Kahn and Vladamir Frank Kubala, Jr., were in the store at the time of the shooting. (St. Trial Tr.-VI at 148). Kubala told the police that the taller suspect "came around the meat counter and stuck a gun in my face[.]'" (Resp. Exh. 11). Kahn, who speaks little English,[3] said that the shorter of the two men demanded money from the cash register while the taller suspect watched from the front of the store. According to Kahn, it was the shorter suspect, not the taller man, who came out from behind the counter and pointed his gun at Kubala. *(Id.,* Exh. 12). Neither

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[2] This is a capital offense under Texas law. *See TEX.* PENAL CODE ANN. § 19.03(a)(2) (Vernon 1994) (a person commits the offense of capital murder if "the person intentionally commits [ ] murder in the course of committing or attempting to commit ... robbery").

[3] Kahn, a native of Pakistan, speaks Urdu. (St. Trial Tr.-VI at 91).

Kubala nor Kahn were able to describe the hair length or hair style of the suspects. (St. Hab. Tr. at 44). However, both witnesses helped the police create composite sketches that were circulated to law enforcement agencies and various media outlets. (St. Trial Tr.-VI at 113, 149-50).

The investigation remained dormant for nearly 18 months due to the lack of any productive leads. *(Id.* at 161). Then, on July 29, 1998, the police received information that pointed to petitioner as a possible suspect. *(Id.* at 162-63). Alan T. Patton, the lead investigator, obtained a picture of petitioner as well as five other photographs from the Dallas County Sheriffs Department in order to prepare a photo line-up. *(Id.* at 163). Kubala immediately identified petitioner as one of the suspects who robbed the convenience store. *(Id.* at 172). Kahn was more tentative, unable to chose between petitioner and another photograph in the line-up. *(Id.* at 180). Based on Kubala's positive identification, petitioner was arrested and charged with capital murder. *(Id.* at 175).[4]

The case proceeded to trial on September 14-15, 1999. The state's case rested entirely on the eyewitness testimony of Kubala and Kahn. No fingerprints or physical evidence, other than a shell casing, were found at the crime scene. *(Id.* at 154). At trial, Kubala, who lived next door to the Eagle Food Mart, testified that he heard a loud "pop" come from inside the store shortly after 6:00 a.m. on February 7, 1997. *(Id.* at 46). Kubala immediately went to the store to investigate the noise. As he approached the meat counter, someone ran past him in a "blur." *(Id.* at 52). Kubala then saw a "black male

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[4] Another suspect, Marcel Daniel, was also arrested by the police. However, Daniel was subsequently "no-billed" by the grand jury. (Evd. Hrg. Tr. at 61).

with a little mustache" standing behind the counter. *(Id.* at 52, 54). The man pointed a gun at Kubala's head and told him to "[g]et down." *(Id.* at 53). Kubala kneeled at the comer of the counter and watched as the man backed out the front door of the store. *(Id.* at 57-58, 60). According to Kubala, he had a good view of the suspect for "five to seven seconds." *(Id.* at 60). Kubala told the jury there was "no doubt" in his mind he could recognize the person he saw behind the meat counter and proceeded to identify petitioner as the man who pointed a gun at him. *(Id.* at 73, 87). When asked how he could remember the suspect, Kubala responded, "It just stuck in my mind. I can think back and remember exactly what happened on the day it happened." *(Id.* at 87). Defense counsel did not question this witness, but reserved his fight to cross-examination. *(Id.* at 89).

Kahn also testified at trial through an interpreter. She said that two African-American men came into her store on the morning of February 7, 1997. Each man had a gun. *(Id.* at 97). Kahn stated that one of the men shot her husband from across the counter. *(Id.* at 98, 100). The other suspect, who was standing behind the counter near the register, demanded money. *(Id.* at 106). Kahn removed the cash drawer and handed it to the second suspect. *(Id.* at 107). The man took $200 and left the store. *(Id.* at 107-09). After stating that she could identify the person who shot her husband, Kahn initially said that the man was not in court. *(Id.* at 100). Upon further questioning by the prosecutor, Kahn identified a spectator in the gallery as the shooter. *(Id.* at 104, 106). Defense counsel reserved his right to cross-examination. *(Id.* at 114).

Just before the state rested its case-in-chief, the prosecutor recalled Kahn and asked if she could identify the man who

shot her husband. (St. Trial Tr.-VII at 27).[5] This time, she identified petitioner. *(Id.* at 29). Kahn told the jury that she intentionally identified the wrong person in her prior testimony because she was afraid. *(Id.* at 28-29). Defense counsel then cross-examined Kahn in an attempt to impeach her in-court identification of petitioner. *(Id.* at 30-42). Kahn also was questioned about inconsistencies between her trial testimony and a prior statement given to the police. *(Id.* at 42-45). However, counsel never asked Kahn whether any of the suspects wore a bandana or how the police could prepare composite sketches based on her limited description of the suspects. Nor were these issues ever raised with Kubala. Instead, after consulting with petitioner, counsel chose to rest without recalling any wimesses. *(Id.* at 50). The jury deliberated for more than five hours before finding petitioner guilty of capital murder as charged in the indictment. (St. Trial Tr.-VIII at 3).

C.

Petitioner contends that his attorney was ineffective for failing to adequately cross-examine the state's witness. Because the case against him was based entirely on the testimony of Kubala and Kahn, petitioner maintains that counsel should have questioned these witnesses about their limited description of the suspects and the fact that one of the men wore a bandana across his face.

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[5] Two police officers, Alan T. Patton and Mark Taddonio, two forensic technicians, Vicki Hall and Sylvia Reyes, and Dallas County Medical Examiner Jeffrey Barnard also testified for the state at trial. However, none of these witnesses linked petitioner to the robbery and shooting.

1.

This claim was first raised on collateral review in state court. Among the evidence presented bypetitioner was the sworn affidavit of Jay Matthews, a private investigator, who spoke with Kubala and Kahn about their recollections of the robbery and shooting. Kubala told Matthews that he did not see a mask on either suspect and never told anyone that a mask was involved in the crime. However, Kubala acknowledged that the person who ran past him "could have had on a mask." (St. Hab. Tr. at 55). Kahn, on the other hand, said that the man who shot her husband wore "a face mask, a scarf or bandana, covering from under his eyes down." *(Id.* at 52).[6] The accomplice did not wear a bandana or mask. According to Kahn, the masked suspect moved toward the door after the shooting while his accomplice came around the counter and demanded money out of the cash drawer. When Kubala entered the store, the masked suspect pulled him inside and pointed a gun at him. Kahn said that she was able to identify petitioner as the man who shot her husband "by his eyes." She stood by that identification in her interview with Matthews. *(Id.* at 52-53).

Petitioner's attorney, Larry Baraka, also submitted an affidavit to the state habeas court. Baraka explained that he made a strategic decision not to cross-examine any witnesses until the state rested its case-in-chief. (Supp. St. Hab. Tr. at

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[6] Respondent argues that "anything Kahn purportedly told [Matthews] regarding Dunagan's identity as the man who was wearing the bandana is inadmissible hearsay and incompetent evidence in this proceeding." (Resp. Ans. at 11). Assuming *arguendo* that Kahn's statements to Matthews constitute hearsay, the state failed to object on that basis in the state habeas court.

16). After Khan misidentified one of the courtroom spectators as the shooter, Baraka decided to forego his strategy and asked her to identify the suspect one more time. Khan again pointed to a gentlemen in the audience. Baraka said that he did not question Kubala or Kahn about the bandana worn by one of the suspects because "I felt the state had not met it's [sic] burden of proof." *(Id.* at 17). According to Baraka:

> [W]ith regards to the issue of the mask, I again felt it was not worth opening up an opportunity for the state to give rebuttal testimony, by going forward on defense, because I felt it was obvious to the jury that the eye-witnesses did not correctly identify the Defendant in open court after repeated attempts to do so. I felt the jury would question her identification.
>
> * * * *
>
> I was aware that the offense report reflected one of the men wore a mask during the robbery. I advised them that I didn't think the state had met it's [sic] burden of proof, in that the only eye-witness mis-identified the Defendant. I advised the family as well as the Defendant, that we could go forward for the defense but that the state would be allowed to bring out the defendants [sic] prior criminal convictions before the jury, if he testified and those convictions could prejudice the jury against. [sic]. I advised them that the Defendant did not have to prove his innocence, but that the state had to convince the jurybeyond a reasonable doubt. I further advised them that I thought we should rest, so that if the state had any rebuttal witnesses they could not be called, and based upon the case the state presented, there was a legitimate issue if the state had met it's [sic] burden.

(Id. at 17-18). The state habeas judge, who did not preside over petitioner's trial, accepted Baraka's explanation and found that "counsel was not ineffective in his representation." *(Id.* at 14). The Texas Court of Criminal Appeals agreed and denied relief. *Ex parte Dunagan,* No. 52,270-01.

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Concerned about the sufficiency of Baraka's affidavit and other inconsistencies in the record, this court held an evidentiary hearing on September 18, 2003 to fully explore the factual basis of petitioner's ineffective assistance of counsel claim. At this hearing, Baraka elaborated on his strategy for not questioning Kubala and Kahn about the bandana or their vague descriptions of the suspects. Baraka explained that he reserved cross-examination in order to "lock" the witnesses into their testimony. (Evd. Hrg. Tr. at 10). Although he intended to recall some of the state's witnesses later in the trial, Baraka decided to rest his case without presenting any evidence after Kahn misidentified a spectator in the courtroom as the man who shot her husband. *(Id.* at 14-16, 18-19). When asked why he did not question Kahn about the bandana after she changed her testimony and identified petitioner as the shooter, Baraka stated:

> Well, probably from the vantage point of the bandana for me didn't hold a lot of relevance in that from talking to my client, okay, he says he wasn't there, looking at the offense report that talks about suspect one and suspect two, the testimony being that Mr. Dunagan was the tallest of the two, the fact that the second suspect was the one with the bandana, which wouldn't have much relevance to my client's situation, I didn't get into that. I really wanted to probably--I did recross her to attempt to find out if she made an error,

> why now that she recognizes she made that error, and I believe I asked her questions with--she said something, that she was afraid, and I asked if Mr. Dunagan or any member of his family or associates had threatened her or scared her, and she said they had not. So, no, I did not get into the bandana.

(Id. at 21). As for his failure to question Kubala about the bandana, Baraka explained:

> Well, I mean, based on what I was hearing, my evaluation was basically that I would not probably going to shake him, that I basically would be reinforcing in the jury [sic] mind his, once again, ability to repeat he's the one. Now, in term--if I might add with regards to that question, that came into play really only as part of my evaluation at the end of the state's case if we were going to go forward or not or close, because had I gone forward, I would have cross-examined him even though he would have been repeating it again.

(Id. at 34). Baraka admitted that he would not have opened the door to rebuttal evidence by cross-examining, rather than recalling, the state's witnesses. *(Id.)*. He also acknowledged that evidence regarding the bandana and "other problems with the identification" would have been helpful to petitioner and could have been used in closing *argument. (Id.* at 24). Still, Baraka decided not to cross-examine Kahn about the bandana or recall Kubala based, in part, on his fear that the prosecutor might present evidence that petitioner bragged about the killing to ajailhouse informant. *(Id.* at 45-46). Upon questioning bythe court, Baraka offered one last rambling explanation of why he never asked any of the state's witnesses about the bandana:

Well, part of it had to do with the way the trial progressed. As I said before, my first part was just to listen and to see what was what and then put our case forward, recognizing I had no other alternatives, even though I didn't think the defense strategy was going to be that good. I'm not quite sure--well, yeah, when the female eyewitness testified and made the wrong identification, that was such a strong thing that I wanted to get on that immediately and focus with that aspect, so I didn't deal with any of the little nuances that I would have worked with with regards to the bandana, the height--heck, I would have gotten into the lighting of the store, the distance, all of those factors I would have gotten into, but once I got with her and she was pretty consistent about this wrong identification, we rested that day. Then I started thinking, well, here's something that I did not anticipate happening, because in all sincerity, my evaluation of the case was, as I told them, we're in a tight fix here. This eyewitness business, I watch them. They can say it's the man in the moon, and the juries are going to believe them if these people look decent, and reading everything that this person has said in regards to identifying the person, again, I'm going to ask those questions, but I've been in trial. I've asked those questions. Juries aren't going to go with it unless I can come up with something very strong to show some question about their credibility. So that night I'm thinking, well, should I go in and go for it, at least just asking the questions and not call my client, would the state bring back that witness. And, you know, I'm seeing this guy on the witness list, I know he's there, and I'm wondering why they don't bring him out in the beginning.

> So my thing is I'm looking to win, I'm not looking just to ask questions to be asking them. Do I think the kind of questions I'm going to ask this guy is going to be significant enough that it's going to raise a jury's sense of doubt? I personally did not, still don't think it would have; but had I been prepared to go forward, I would have asked them because you use everything to see if it will stick. In this instance I had to make a decision, do I even want to reopen and allow the state an opportunity to not only add onto this ID witness, but another human being is going to come in and say from this man's own lips he committed this crime, and, again, with the weak alibi that I had, so that's when I went to Mr. Dunagan. In fact, co-counsel with me came in that moming, and we were kind of laughing because she said, you know, I had an epiphany last night. Why don't we close? I know this is risky. I said, wow, I had that same thought, and I said but here's the problem, you know, we didn't really cross this person, we didn't cross this person, and I'm not too comfortable with that, but I know based on what we know, I'm probably not going to shake these people. Do I really want to risk this? So I decided in talking to him, this is a high-risk thing we're doing. I think the jury may hang. That's what I'm looking at.

(Id. at 63-65).

Patrick Kirlin, the lead prosecutor in the case, also testified at the evidentiary hearing. Kirlin said that he would have called a jailhouse informant to testify against petitioner had he attempted to impeach the identification testimony of the state's witnesses by eliciting evidence that one of the suspects wore a bandana. *(Id.* at 69-70). The informant, Dave

Spencer, had given a statement to the police implicating petitioner in the robbery and murder ofBakrat Ali. *(Id.* at 76-77; *see also* Resp. Exhs. 13 & 14).[7] Kirlin further stated that he would have tried to introduce evidence of petitioner's prior aggravated robbery convictions to show a correlation between the older robberies and the instant offense. (Evd. Hrg. Tr. at 70). However, when cross-examined by habeas counsel, Kirlin acknowledged that none of the prior robberies occurred inside a convenience store and may have been inadmissible for that reason. *(Id.* at 85).

3.

Cross-examination is "the greatest legal engine ever invented for the discovery of truth." *California v. Green,* 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970), quoting 5 J. WIGMORE, EVIDENCE § 1367 (3d ed. 1940). The importance of cross-examination in the American judicial system cannot be overstated. It "sheds light on [a] witness' perception, memory and narration" and "can expose inconsistencies, incompleteness, and inaccuracies in his testimony." *See Perry v. Leeke,* 488 U.S. 272, 283 n.7, 109 S.Ct. 594, 601 n.7, 102 L.Ed.2d 624 (1989), *Citing* 4 J. WEINSTEIN, EVIDENCE ¶ 800[01] (1988). "There are few subjects, perhaps, upon which [the Supreme] Court and other courts have been more nearly unanimous than in the

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[7] The prosecutor obtained statements from two jailhouse informants, Spencer and Eldunta Washington. (Resp. Exhs. 13 & 14). However, only Spencer's statement directly implicates petitioner in the offense. Although Washington recounts his conversations with Spencer and Marcel Daniel about the robbery and shooting, he does not mention any inculpatory statements made by petitioner. *(See* Resp. Exh. 14).

expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Miller v. Illinois,* 476 U.S. 530, 540, 106 S.Ct. 2056, 2061-62, 90 L.Ed.2d 514 (1986), *quoting Pointer v. Texas,* 380 U.S. 400, 405, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965).

With all due respect to trial counsel and the state habeas court, this court is unable to discern any legitimate tactical reason for not cross-examining or otherwise questioning the only two eyewitnesses to the crime about the bandana worn by one of the suspects. Baraka offers two reasons for his decision to rest without presenting evidence that one of the suspects wore a bandana across his face--it would have opened the door to harmful rebuttal evidence and the bandana was not relevant to his client. Neither explanation is particularly convincing. First, Baraka could have cross-examined Kubala and Kahn during the state's case-in-chief. This would have allowed him to rest without presenting evidence and precluded the state from calling any rebuttal witnesses. In fact, Baraka cross-examined Kahn on a variety of subjects after she changed her prior testimony and identified petitioner as the shooter. However, he inexplicably failed to ask this wimess if one of the suspects wore a bandana across his face. Had Baraka effectively cross-examined Kahn, he could have further impeached her already shaky identification testimony by showing that she did not have a clear view of the shooter's face.

Second, the court does not agree that the bandana was irrelevant to petitioner's defense. Although Kubala steadfastly maintained that petitioner did not have a mask, he did not see the other suspect. Nor is it entirely clear that petitioner was the suspect who encountered Kubala. In a statement given to

the police shortly after the offense, Kahn indicated that the shorter suspect came out from behind the counter and pointed his gun at Kubala. (Resp. Exh. 12). Kahn later told petitioner's investigator that the suspect who pulled a gun on Kubala wore a bandana or mask. (St. Hab. Tr. at 53). While Baraka pointed out some inconsistencies between Kahn's trial testimony and her prior statement on cross-examination, he never asked any questions about a bandana. As Baraka himself belatedly recognizes, evidence regarding the bandana and "other problems with the identification" would have been helpful to petitioner and could have been used in closing argument.

(Evd. Hrg. Tr. at 24).

The only plausible strategy articulated by Baraka for failing to question Kubala and Kahn about the bandana was his fear that the prosecutor might present evidence that petitioner bragged about the killing to a jailhouse informant. *(Id.* at 45-46). The court initially notes that Baraka offered this explanation for the first time at the evidentiary heating on petitioner's federal writ. He never attempted to justify his decision on this ground in the state court proceeding. For that reason alone, his explanation is suspect. Moreover, the statement of this informant is short on details and, in some respects, inconsistent with Kahn's version of the facts. Dave Spencer stated that he met petitioner and Marcel Daniel at a night club two days after the robbery. (Resp. Exh. 13). The three started "partying" at 11:30 p.m. that evening. When Spencer asked petitioner where he got his big diamond ring, petitioner boasted that he and Daniel robbed a store in Grand Prairie of $60,000. Petitioner allegedly said that there were "some Iranian foreign people at the store and that the man was bullshitting and I shot him in the chest or stomach." *(Id.)*.

Sometime later, Spencer saw one of the composite sketches on television and recognized the suspect as petitioner. (*Id.*).

As Kirlin readily acknowledged at the evidentiary hearing, Spencer, who had a pending murder charge against him, was not the type of witness he normally would like to present at trial. (Evd. Hrg. Tr. at 77). Nevertheless, Kirlin insists he would have done so had Baraka attempted to inject the bandana into the case. *(Id.* at 77-78). The court finds this testimony not credible. Given Kahn's shaky identification ofpetitioner and other problems with the state's case, there was no reason for the prosecutor not to call Spencer as a witness if he thought there was any chance his testimony would be believed by a jury. It is disingenuous at best to suggest that Spencer was held back by the prosecution in the event that Baraka attempted to elicit evidence about the bandana.

The only viable defense available to petitioner was to somehow impeach the identification testimony of Kubala and Kahn. This defense was seriously compromised when Baraka decided not to question these witnesses about the bandana worn by one of the suspects. While strategic decisions made by counsel after a thorough investigation of the law and the facts are presumed to be reasonable, "*Strickland* does not require deference to those decision of counsel that, viewed in the light of the facts known at the time of the purported decision, do not serve any conceivable strategic purpose." *Moore v. Johnson,* 194 F.3d 586, 615-16 (5th Cir. 1999) (citing cases). Baraka's decision to ignore the bandana did not further any legitimate defense strategy. To the contrary, it left Kubala's testimony virtually unchallenged, a fact noted by the prosecutor during closing argument. *(See* St. Trial Tr.-VII at

70).[8] This amounts to deficient representation under *Strickland* and its progeny. *See, e.g. Beltran v. Cockrell*, 294 F.3d 703, 734-35 (5th Cir. 2002), *cert. denied*, 123 S.Ct. 871 (2003) (holding that counsel was ineffective for failing to challenge identification testimony of eyewitnesses).

The court further determines that petitioner was prejudiced by this deficient representation. Although Kubala was unwavering in his identification of petitioner, the evidence suggests that he and Kalm may have identified different suspects as the same person before the jury. Kubala testified that a man standing behind the counter pointed a gun at this head and told him to "[g]et down." (St. Trial Tr.-VI at 52-54). In a prior statement, Kubala indicated that this suspect stood 6' 1" or 6' 2" tall and weighed around 200 pounds. (Resp. Exh. 11). Kahn, on the other hand, testified the taller of the two suspects shot her husband from across the counter and retreated to the front door after the shooting. (St. Trial Tr.-VI at 98-100). His accomplice, who was shorter, came around the counter and demanded money from the register. (*Id.* at 106-07). Kahn told the police that the shorter suspect, who stood about 5' 8" tall and weighed between 150-160 pounds, pointed a gun at Kubala. (Resp. Exhs. 12 & 15). In court, Kahn identified petitioner, who stands 5' 10" tall, as the man who shot her husband. (St. Trial Tr.-VII at 29). Thus, it appears that Kubala identified petitioner as the accomplice behind the counter whereas Kahn identified petitioner as the shooter. This conclusion is bolstered by the

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[8] In response to defense counsel's argument that there was a reasonable doubt as to identity, the prosecutor remarked, "I think they're trying to-from their argument, *and the lack of cross-examination*, that they're conceding everything we have to prove." (St. Hab. Tr.-VII at 70) (emphasis added).

evidence adduced in the state habeas proceeding. When interviewed by petitioner's investigator, Kubala said that the gunman did not have a mask. (St. Hab. Tr. at 55). However, Kahn stated that the suspect who pointed a gun at Kubala wore a bandana. *(Id.* at 53). Evidence that one of the suspects wore a bandana across his face likely would have added to this confusion and greatly enhanced the prospects of a hung jury or an outright acquittal. *See Wiggins,* 123 S.Ct. at 2543 (federal habeas court may consider both the evidence adduced at trial and the evidence adduced in the state habeas proceeding in determining whether petitioner was prejudiced by deficient performance of counsel).

This might have been a closer case had Baraka adhered to his original trial strategy and not cross-examined any witnesses. Though such a tactic may have been ill-advised, petitioner would have had a more difficult time proving that this strategy was so deficient that it amounted to an objectively unreasonable application of clearly established Supreme Court precedent. However, once Baraka decided to cross-examine Kahn, there was no discernable strategic purpose for not questioning her about the bandana worn by one of the suspects. At a minimum, this important piece of evidence could have been used by defense counsel in closing argument to cast doubt on Kubala's identification testimony. The state habeas court all but ignored this aspect of petitioner's claim, focusing instead on Baraka's original strategy not to cross-examine witnesses until the state rested its case and his subsequent decision not to present evidence due to Kahn's misidentification. *(See* Supp. St. Hab. Tr. at 13-14). Because Baraka failed to adequately cross-examine Kahn, thereby leaving Kubala's identification testimony virtually unchallenged, petitioner was deprived of his Sixth Amendment right to effective assistance of counsel under *Strickland.* Federal habeas relief is proper on this ground.

D.

Petitioner also criticizes his attorney for failing to present evidence to the jury that he was at home with his girlfriend, Dawn Williams, at the time of the offense waiting for a visit from his parole officer. Williams was available to testify at trial as an alibi witness but was never called by the defense. Nor did counsel call petitioner's parole officer, Ken Mosier, who would have confirmed that he made a home visit on February 7, 1997. *(See* St. Hab. Tr. at 58-63).

In an affidavit submitted to the state habeas court, Baraka explained that he did not call Williams or Mosier because neither witness could testify that they were with petitioner during the hour ofthe robbery. (Supp. St. Hab. Tr. at 17). Williams refuted this statement in her own affidavit. According to Williams, petitioner came home at approximately 1:00 a.m. on February 7, 1997 and "remained home continuously after that until at least 8:30 a.m. when I left for work." (St. Hab. Tr. at 58). The state court considered this evidence and found that "[t]he alibi testimony of the live in girlfriend would have been easily attacked for veracity by the State." (Supp. St. Hab. Tr. at 13). Additionally, the court found that "[t]his testimony would have also opened the door to Applicant's prior conviction for aggravated robbery for which he was currently on parole." *(Id.)*. These were sound tactical reasons for not presenting these alibi witnesses.[9]

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[9] Had Ken Mosier been able to confirm that he made a home visit at the exact time the robbery occurred, perhaps counsel would have risked injecting this potentially harmful issue into the case. However, at best, the parole records show only that Mosier met with petitioner sometime on February 7, 1997. (St. Hab. Tr. at 63).

E.

Finally, petitioner contends that trial counsel was ineffective for failing to object in a timely manner to evidence of an extraneous arrest. At issue is the testimony of lead investigator Alan T. Patton. On direct examination, the prosecutor asked Patton what actions he took after learning that petitioner was a potential suspect in the case. Patton responded:

> I came to the Dallas County Sheriffs Department and obtained a photograph of the defendant, as well as a number of other photographs from the Dallas County Sheriffs Department arrest files for the purpose of preparing a six-picture photo line-up.

(St. Trial Tr.-VI at 163). Defense counsel did not object to this testimony. However, when Patton later testified that the photographs obtained from the Dallas County Sheriff did not fit the photo line-up card used by the Grand Prairie Police Department, counsel objected as follows:

> MR. BARAKA: Off. Patton--Your Honor, Off. Patton has been testifying in this court for a long time. He knows what he's doing is improper and that it is wrong. Any reference with regards to what those pictures are, how they came to be, is improper, and we'd ask to have a hearing outside the presence of this jury to discuss these particulars.
>
> THE COURT: I didn't understand him going into that subject matter.
>
> MR. BARAKA: Your Honor, his whole conversation-

THE COURT: I don't think it was a physical explanation.

MR. KIRLIN: That was my understanding, Your Honor.

THE COURT: We're not going into the background of the pictures.

MR. BARAKA: Your Honor, he's already done this. He's emphasized for this jury. For people who are under arrest, who have been arrested. What is the suggestion of that, but the defendant and other people, or past arrestees where they've gotten photographs. It doesn't take a rocket scientist to understand what's happened. We object.

(Id. at 166-67). The objection was overruled and Patton continued with his testimony about the photo line-up. No further mention was made regarding the source of the photographs.

The court agrees that counsel should have objected when Patton initially testified that he obtained petitioner's photograph from the Dallas County Sheriffs Department. However, in view of the trial court's ruling on his subsequent objection, it is not at all clear that the objection would have been sustained. Nor has petitioner demonstrated prejudice as a result of this isolated error. Accordingly, this ground for relief should be overruled.

RECOMMENDATION

The murder of Barkat Ali was both tragic and senseless. However, federal courts must be "ever vigilant in ensuring

that the constitutionally guaranteed rights of defendants in habeas corpus cases are not violated in substantial and injurious ways." *Shaw v. Collins,* 5 F.3d 128, 133 (5th Cir. 1993). The record in this case establishes that petitioner was deprived of his Sixth Amendment right to effective assistance of counsel when his attorney failed to adequately cross-examine the only two eyewitnesses to the crime. Accordingly, petitioner's application for writ of habeas corpus should be conditionally granted. The writ should issue unless petitioner is retried within 90 days after these findings are approved by the district judge.

DATED: November 4, 2003.

/s/ _____
Jeff Kaplan
United States Magistrate Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 3-03-CV-0374-D

[Filed April 28, 2004]

GREGORY BRUCE DUNAGAN, Petitioner,	)
v.	)
DOUG DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	)

MEMORANDUM OPINION AND ORDER

Petitioner Gregory Bruce Dunagan ("Dunagan"), convicted and sentenced to life imprisonment for capital murder, petitions the court for a writ of habeas corpus based on ineffective assistance of counsel. Respondent Douglas Dretke (the "State") opposes the petition. The court holds that Dunagan is not entitled to relief under the standards prescribed by the Antiterrorism and Effective Death Penalty

Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. Accordingly, the court denies Dunagan's petition and dismisses this action with prejudice.

I.

The background facts of Dunagan's case are described by the Texas Court of Appeals in its unpublished opinion on direct appeal. *See Dunagan v. State,* No. 05-99-01694-CR, slip op. at 1-2 (Tex. App. Nov. 9, 2000, pet. ref'd). The court adds to that discussion pertinent trial evidence and procedural history necessary to understand the court's disposition of this petition.

On February 7, 1997, shortly after 6:00 a.m., Barkat Ali ("Ali") was murdered during the course of a robbery of the Eagle Food Mart located in Grand Prairie, Texas, which he owned and operated with his wife, Ishrat Khan ("Khan"). Khan and another eyewitness, Vladimir Frank Kubala ("Kubala"), identified the robbers as two African-American males. One was described as approximately six feet tall, weighing 200 pounds, and wearing a thin mustache. The other was shorter. Kubala, who lived next door to the Eagle Food Mart, entered the store as the robbery was in progress. He told the police that the taller suspect came around the meat counter and stuck a gun in his face. Kubala later told an investigator working for Dunagan's habeas counsel that he did not get a good view of the other suspect, who rushed out the door, and that he could have worn a mask, but he was not sure. Kubala was certain the suspect who pointed the gun at him was not wearing a mask. Khan, whose native language is Urdu and speaks little English, told the police that the shorter suspect demanded money from the cash register while the taller suspect watched from the front of the store. She told Dunagan's habeas investigator that the taller robber shot her

husband and that he wore a scarf or bandana that covered his nose and mouth. Kahn thus identified the taller suspect as the shooter, and Kubala identified him as the accomplice. Neither witness was able to describe the robbers" hair length or style, but each assisted police in creating a composite sketch.

Eighteen months elapsed without any productive leads. On July 29, 1998 the police received information implicating Dunagan and Marcel Daniel ("Daniel"). Sergeant Alan T. Patton ("Sgt. Patton"), a Grand Prairie Police Department detective who was the lead investigator on the case, prepared a photo lineup of six men, including Dunagan. Kubala immediately identified Dunagan as one of the robbers. Khan was unable to select between Dunagan and one other man. Based on Kubala's positive identification, Dunagan was arrested and charged with capital murder. Daniel was later no-billed by the grand jury.

At trial, the State relied primarily upon the eyewitness testimony of Khan and Kubala due to the absence of physical evidence (other than a spent shell casing) or fingerprints. Kubala testified that he heard a loud "pop" come from inside the store shortly after 6:00 a.m., and he went to the store to investigate. As he approached the meat counter, someone ran past him in a blur. Kubala observed an African-American male with a little mustache standing behind the counter. The man pointed a weapon at him and ordered him to get down. Kubala knelt down at the comer of the counter and watched as the man backed out of the front door of the store. He testified that he had a good view of the robber for five to seven seconds. Kubala maintained that he had no doubt that Dunagan was the man who pointed the gun at him. In response to the State's questioning concerning how he could remember that it was Dunagan, Kubala stated that "[i]t just stuck in my mind. I can think back and remember exactly

what happened on the day it happened." Tr. 6:87[1] Dunagan's counsel did not cross-examine Kubala, but he reserved the fight to do so.

Khan testified at the trial through an interpreter. She averred that two armed African-American men entered the Eagle Mart Food Store. She said that one robber shot her husband from across the counter, and the other, who was standing behind the counter near the register, demanded money. She removed the cash drawer and handed it to the second robber, who took $200 and fled.

Khan initially testified that she could identify the man who shot her husband, but that he was not present in the courtroom. The State questioned her further, and she identified a trial spectator as the shooter. Dunagan's counsel reserved the fight to cross-examine her. The next day of trial, the State recalled Khan to the stand and asked her whether she could identify the shooter. This time she identified Dunagan. Khan explained that she had intentionally tidied to identify Dunagan during her prior testimony because she was afraid. Tr. 7:27-31. One of Dunagan's counsel–Larry W. Baraka, Esquire ("Baraka")--then cross-examined Khan in an attempt to impeach her in-court identification of Dunagan as the shooter. He also questioned her about other matters in an attempt to impeach her, including inconsistencies between her trial testimony and her statement to police. *Id.* at 42-44. Baraka did not, however, pursue cross-examination of Khan concerning whether either of the robbers had worn a bandana or how police could prepare a composite sketch based on her

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[1] References to "Tr." are to the volume and page of the transcript of the state trial.

description of the suspects. Nor did he raise these matters by cross-examining Kubala. Baraka instead consulted with Dunagan and his family and chose to rest without recalling any of the State's witnesses to cross-examination.

A jury convicted Dunagan of murdering Ali during the course of robbing the store, a capital offense under Tex. Penal Code Ann. § 19.03(a)(2) (Vernon 1994). Following his conviction, Dunagan appealed, and the Texas Court of Appeals affirmed. The Texas Court of Criminal Appeals denied his petition for discretionary review.

Dunagan applied for a writ of habeas corpus in state court. Because the state habeas court had not entered findings of fact and conclusions of law concerning Dunagan's assertion that his counsel were ineffective for failing to call Dawn Carol Williams ("Williams") as an alibi witness, the Texas Court of Criminal Appeals remanded the petition to develop the record and enter findings and conclusions. *Ex parte Dunagan,* No. 52,271-01 (Tex. Crim. App. June 5, 2002) (per curiam). The state habeas court did so. *See* Aug. 14, 2002 St. Hab. Order.[2] The Texas Court of Criminal Appeals then denied relief in an unpublished order based on the state habeas court's findings and conclusions and its own review of the record. *Ex parte*

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[2] In his February 19, 2002 state habeas application, Dunagan sought relief for ineffective assistance of counsel based on the three grounds that he now asserts: failure to cross-examine, failure to present favorable evidence, and failure to object to evidence of extraneous acts.

Dunagan, No. 52,271-01 (Tex. Crim. App. Oct. 30, 2002) (per curiam).[3]

Dunagan then filed the instant petition for a writ of habeas corpus, contending that he received ineffective assistance of counsel under the Sixth and Fourteenth Amendments because his trial attorneys (1) failed to cross-examine effectively the State's witnesses, (2) failed to present favorable alibi evidence from Williams, Dunagan's live-in girlfriend, and Ken Mosier ("Mosier"), Dunagan' s parole officer, and (3) failed to object to evidence of extraneous acts.[4]

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[3] Throughout the remainder of this opinion, the court will refer to the "state habeas court" as a single tribunal, although it recognizes that the Texas Criminal Court of Appeals independently determined that habeas relief should be denied.

[4] Although Dunagan was tried for capital murder, the State did not seek the death penalty. His petition was therefore referred under this court's standing procedures to a magistrate judge for recommendation. Based on Dunagan's first contention, the magistrate judge recommends that the petition be conditionally granted unless the State retries him. Because this court's review of the magistrate judge's recommendation is *de novo,* it owes no deference to his conclusions, and it decides Dunagan's petition afresh.

The magistrate judge conducted an evidentiary hearing before entering his recommendation, stating that he was "[c]oncerned about the sufficiency of Baraka's affidavit and other inconsistencies in the record" and that an evidentiary hearing was necessary "to fully explore the factual basis of [Dunagan's] ineffective assistance of counsel claim." Mag. Rec. at [8]. It is not apparent to the court why a federal evidentiary hearing was necessary under the standards prescribed by 28 U.S.C. § 2254(e)(2). Had this court considered the petition in the first instance, no hearing would have been convened. Accordingly, the court has not considered the hearing, or the evidence presented in connection with the hearing,

II

Dunagan's habeas petition is governed by AEDPA. 28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id. This court's determination requires deference to the state court's adjudication of Dunagan's claim unless the adjudication is flawed under at least one of these provisos. *See Kutzner v. Johnson,* 242 F.3d 605, 608 (5th Cir. 2001); *Wheat v. Johnson,* 238 F.3d 357, 360 (5th Cir. 2001). "Under the 'contrary to' clause [of § 2254(d)(1)], a federal habeas court may grant [a writ of habeas corpus] if the state court arrives at a conclusion opposite to that reached by [the Supreme Court of the United States] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 412-13 (2000). "A 'run-of-the-mill state-court decision applying the correct legal role'

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in deciding this petition.

would *not* fit within this exception as 'diametrically different' or 'opposite in character or nature' from Supreme Court precedent." *Beazley v. Johnson,* 242 F.3d 248, 256 (Sth Cir. 2001) (quoting *Williams,* 529 U.S. at 406).

"Under the 'unreasonable application' clause [of § 2254(d)(1)], a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner' s case." *Williams,* 529 U.S. at 413. "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409. "A state court's decision will be based on an unreasonable application of clearly established federal law when it is objectively unreasonable." *Kutzner,* 242 F.3d at 608. "[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams,* 529 U.S. at 410. "Under § 2254(d)(l)'s 'unreasonable application' clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. "[A] federal court is not to substitute its judgment for that of the state court. Rather under AEDPA, federal habeas relief is proper only if the state habeas court applied federal law in an 'objectively unreasonable' manner." *Schaetzle v. Cockrell,* 343 F.3d 440, 447 (5th Cir. 2003), *cert. denied,* U.S. ___, 124 S.Ct. 1156 (2004). "If a state court has already rejected an ineffective-assistance claim, a federal court may grant habeas relief if the decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Yarborough v.*

Gentry, U.S. ____, 124 S.Ct. 1, 4 (2003) (per curiam) (quoting 28 U.S.C. § 2254(d)(1)). "Where, as here, the state court's application of governing federal law is challenged, it must be shown to be not only erroneous, but objectively unreasonable." *Id.* (citing cases).

In determining whether the state court unreasonably applied clearly established federal law, this court reviews the state court's ultimate legal conclusion, not its reasoning or written opinion. *Catalan v. Cockrell*, 315 F.3d 491,493 (5th Cir. 2002) *(citingNeal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (per curiam) (en banc), *cert. denied*, 537 U.S. 1104 (2003)). When, as here, the, Texas Court of Criminal Appeals denies a habeas petition without written order on timings of the trial court, this court "(1) assumes that the state court applied the proper 'clearly established Federal law'; and (2) then determines whether its decision was 'contrary to' or 'an objectively unreasonable application of that law." *Schaetzle*, 343 F.3d at 443 (citing *Catalan*, 315 F.3d at 493 & n.3; *Robertson y. Cain*, 324 F.3d 297, 303 (5th Cir. 2003)).

"The clearly established federal law that sets the standard for ineffective assistance claims is *Strickland v. Washington*[.]" *Catalan*, 315 F.3d at 492. Under the *Strickland* test the following showing is necessary to demonstrate ineffective assistance:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors

> were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687(1984).

> To establish ineffectiveness, a defendant must show that counsel's representation fell below an objective standard of reasonableness. To establish prejudice he must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Williams, 529 U.S. at 390-91 (internal quotation marks deleted) (quoting *Strickland,* 466 U.S. at 688, 604). If Dunagan fails meet either prong of the *Strickland* test, the court need not address the other component. *See Strickland,* 466 U.S. at 697; *Carter v. Johnson,* 131 F.3d 452, 463 (5th Cir. 1997) ("Failure to prove either deficient performance or actual prejudice is fatal to an ineffective assistance claim.").

Courts "indulge a strong presumption" that counsel's conduct falls within the range of reasonable assistance. *Strickland,* 466 U.S. at 689. Courts must "not fall prey to 'the distorting effect of hindsight' but must be 'highly deferential' to counsel's performance." *Carter,* 131 F.3d at 463 (quoting *Strickland,* 466 U.S. at 689-90).

Moreover, when a defendant seeks a writ of habeas corpus based on ineffective assistance,

> [i]t bears repeating that the test for federal habeas purposes is *not* whether [Dunagan] made that showing. Instead, the test is whether the state court's

> decision that [Dunagan] did *not* make the Strickladand-showing--was contrary to, or an unreasonable application of, the standards provided by the clearly established federal law *(Strickland),* for succeeding on his [ineffective assistance] claim.

Schaetzle, 343 F.3d at 444.

III

The court first considers Dunagan's contention that he received ineffective counsel because his counsel, Baraka and Valencia Bush, Esquire, failed to cross-examine effectively the State's witnesses.

A

Dunagan contends the police report indicated that at least one robber wore a bandana across his face and that Khan and Kubala were able to give only limited descriptions of the suspects, that Grand Prairie police and his counsel were aware of this information, but his counsel did not cross-examine the two officers who testified at trial. He maintains that his counsel also failed to cross-examine Kubala or Khan about whether the robbers wore bandanas or how they were able to assist police in preparing composite sketches of the suspects considering their inability to give more than limited descriptions. Dunagan points to a statement in the arrest warrant affidavit that one suspect was behind the counter taking money from the register when Kubala entered the store. According to the affidavit, the man pointed a weapon at Kubala and forced him to get down as the man exited the store. Kubala identified this man as Dunagan in a photo line-up conducted approximately 18 months later. At trial, Kubala identified Dunagan as the person he saw behind the counter

who pointed the gun at him. Khan said it was the accomplice, not the shooter, who approached her and took the money from the register. Dunagan argues that, although both Khan and Kubala identified him as being involved in the shooting of Ali, Khan identified him as the shooter, not as the one who took the money from the register, and Kubala identified him as the accomplice who took the money from the register, i.e., not the shooter.

Dunagan also relies on interviews of Kubala and Khan conducted after the trial, in 2001. Khan averred that the man who shot her husband wore a bandana across his face. She said she was able to identify him at trial by his eyes. According to Khan, the accomplice who robbed her did not have a bandana. Dunagan complains that his counsel did not bring this evidence before the jury. Kubala said the person he identified (i.e., the one who pointed the gun at him) was not wearing a bandana, meaning that the person he saw was the same individual who Khan says robbed her. Consequently, Dunagan maintains that Kubala and Khan actually identified different suspects as being the same person.

Dunagan argues that in the absence of cross-examination of the police and effective cross-examination of Kubala and Khan, the jury was never made aware of the bandana or about the limited descriptions that Kubala and Khan provided after the offense. The jurors did not know that Khan was identifying Dunagan only by his eyes. And they were unaware that, although Kubala and Khan both eventually identified Dunagan, Kubala had identified Dunagan as the man who robbed Khan, and Khan had identified Dunagan as the one who had shot her husband, who Khan said was a different person from the one who had robbed her. Dunagan maintains that his counsel did not establish through cross-examination the existence of certain facts, or expose the limits of the

witnesses' knowledge of relevant facts, to place them in their proper setting or to test their credibility.

The state habeas court rejected this ground of Dunagan's habeas petition.[5] The court concluded that counsel had made a sound and tactical decision not to cross-examine the State's witnesses until the State rested. St. Hab. Supp. R. 13-14[6] (St. Hab. Ct. Find. No. 2[7]). When Khan was called to testify and could not properly identify Dunagan as the person involved in the crime, counsel did cross-examine her. The state habeas court found:

> Counsel made the decision not to cross examine the State's witnesses until the State rested. When the State's eyewitness was called to testify she was unable to properly identify [Dunagan] as the person involved in the crime. Counsel did cross examine this witness. When the [S]tate rested, counsel conferred with [Dunagan] and his family and proposed the idea of not presenting evidence. The decision was made by counsel and [Dunagan] not to present evidence due to the misidentification of the eyewitness. The record in this case clearly reflects that counsel was prepared for

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[5] Although the state habeas court did not mention *Strickland* in denying relief, this court may assume that the state court was aware of an applied *Strickland* where, as here, the briefs of the parties centered around *Strickland* analysis. See Catalan, 315 F.3d at 493 n.3.

[6] References to "St. Hab. Supp. R." are to the state habeas court supplemental record.

[7] "St. Hab. Ct. Find." means the August 14, 2002 findings of fact and conclusions of law of the state habeas court.

> trial. Numerous persons, records and news organizations were subpoenaed and obviously prepared to testify. However, the strategy of counsel and [Dunagan] was to focus on the misidentification by the eyewitness and not open themselves up to having the jury discover [Dunagan's] previous aggravated robbery conviction.

Id. at 13-14 (St. Hab. Ct. Find. No. 2). The court also found:

> Counsel did not cross examine witnesses during the case in chief as he wanted the State's entire case[ ] cemented prior to cross examining witnesses. The court finds this to be a sound trial strategy in this case especially since the arrest occurred some 18 months after the offense. Once the eyewitnesses were unable to identify [Dunagan] in the courtroom, counsel's strategy changed and the decision was made to focus on that issue and not present additional evidence. This move limited the State's ability to present rebuttal evidence. This decision was made after consultation with [Dunagan] and his family. The court finds that counsel had a sound legal strategy for not presenting evidence in this case and for arguing the issue of misidentification. The fact that another attorney may have handled the case differently does not mean that the tactics in this case were ineffective.

Id. (St. Hab. Ct. Find. No. 3).[8]

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[8] The court recognizes that the state habeas court's finding that "the eyewitnesses were unable to identify [Dunagan] in the courtroom" is erroneous. Only Khan, not Kubala, was unable to identify Dunagan during trial testimony. This mistake is immaterial, however.

B.

To obtain habeas relief under AEDPA based on a claim of ineffectiveness assistance of counsel, Dunagan "must overcome the presumption that, under the circumstances, the challenged action might be considered sound strategy." *Knox v. Johnson,* 224 F.3d 470, 479 (5th Cir. 2000) (quoting *Strickland,* 466 U.S. at 689).[9] "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" *Strickland,* 466 U.S. at 690. This court "will not find ineffective assistance of counsel merely because [it] disagree[s] with counsel's trial strategy." *Crane v. Johnson,* 178 F.3d 309, 312 (5th Cir. 1999). "A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Green v. Johnson,* 116 F.3d 1115, 1122 (5th Cir.1997) (internal quotation marks and citation omitted). "[C]ounsel's 'conscious and informed decision on trial tactics and strategy' is not a permissible basis for a claim of ineffective assistance of counsel unless the strategy was so poor that it robbed the defendant of any opportunity to get a fair trial." *Smith v. Cockrell,* 311 F.3d 661,668 (5th Cir. 2002) (quoting *Green,* 116 F.3d at 1122), *cert. dismissed,* ____ U.S. ___, 2004 WL 530691 (Mar. 18, 2004). "So long as counsel made an 'adequate investigation,' any strategic decisions made as a result of that investigation

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[9] "[E]ven when a court is presented with an ineffective-assistance claim not subject to § 2254(d)(1) deference, a defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Guy v. Cockrell,* 343 F.3d 348, 352 (5th Cir. 2003) (quoting *Bell v. Cone,* 535 U.S. 685, 698 (2002) (internal quotation marks and citations omitted)).

'fall within the wide range of objectively reasonable professional assistance.'" *Id. (quoting Moore v. Johnson,* 194 F.3d 586, 591-92 (5th Cir. 1999)). "Moreover, even if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough,* ___ U.S. at ___, 124 S.Ct. at 6 (citing cases).

Dunagan has failed to demonstrate that the state habeas court's application of clearly established federal law was objectively unreasonable. This is a case in which defense counsel made a conscious and informed decision concerning trial tactics and strategy. Baraka and Bush initially adopted the strategy of locking in the testimony of the State's witnesses without cross-examining them during the State's case-in-chief. They intended to wait until the State rested and then recall the witnesses for cross-examination during Dunagan's case-in-chief. St. Hab. Supp. g. 16. In other words, Dunagan's counsel did intend during the trial to cross-examine each State witness. *See Id.*

This strategy changed, however, when on direct examination Khan testified that the man who shot her husband was not present in the courtroom and, on further questioning by the State, identified a trial spectator as the shooter. Khan returned to the stand the next day to explain why she had not identified Dunagan (she intentionally failed to do so because she was afraid) and to identify him as the person who shot her husband. On the basis that Khan was the ordy eyewitness who professed to be able to identify Dunagan, Baraka opted to cross-examine Khan. *See id.* at 16-17.

Baraka was aware before trial that there was evidence that the men who robbed Ali and Khan wore bandanas.[10] He concluded, however, that the defense should rest because the State had not met its burden of proof. Baraka thought it best to take this approach rather than to go forward putting on evidence that did not definitively show that Dunagan was not guilty. *Id.* at 17. Concerning

> the issue of the mask, [he] again felt it was not worth opening up an opportunity for the state to give rebuttal testimony, by going forward,on defense, because [he] felt it was obvious to the jury that the eyewitness did not correctly identify the Defendant in open court after repeated attempts to do so. [He] felt the jury would question her identification.

Id. Baraka believed that Khan, the only eyewitness to the shooting, had misidentified Dunagan. *See id.* at 18 ("the eyewitness mis-identified the Defendant"). He also concluded that, by Dunagan's not testifying, the State could not introduce his prior criminal convictions, and by his not presenting a case-in-chief, the State could not develop rebuttal evidence. *Id.*

The state habeas court's application of clearly established federal law in deeming it sound trial strategy for counsel to focus on Khan's misidentification is not objectively unreasonable. Khan gave jurors several reasons to doubt her identification of Dunagan. She first testified that the man who

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[10] It can be inferred from the record that Bush was aware of everything that Baraka knew and that she concurred in all strategic decisions. Because the court is addressing the content of Baraka's habeas-affidavit, it will recount what he stated he knew and what strategic decisions he made at trial.

shot her husband was not present in the courtroom. On the State's further questioning, she identified a trial spectator as the shooter. As the court notes below, Dunagan's counsel called into question during closing argument Khan's assertion that she testified this way because she was afraid. The court recognizes that, had counsel established through cross-examination that Khan could only see the shooter's eyes, this would have given jurors an additional reason to doubt her testimony. And it arguably would have been a more potent one: Khan's initial reason for failing to identify Dunagan permitted the jury to infer that she *could* identify him but was afraid to do so. The unexplored reason would have permitted the jury to find that she *could not* identify Dunagan even if she had the courage to do so. But a court – certainly not a federal habeas court – cannot find ineffective representation merely because, with the benefit of hindsight, it discerns that counsel could have made a better strategic choice. Dunagan's counsels' strategic decision to shift gears after Khan faltered on the witness stand on so fundamental a matter as correctly identifying the person who shot her husband cannot be deemed unsound. The state habeas court's application of clearly established federal law is not objectively unreasonable.

Nor can the state habeas court's application of clearly established federal law be deemed objectively unreasonable concerning counsels' strategic choice not to cross-examine Kubala.[11] Although the state habeas court did not address this decision directly, it did so implicitly. And in determining whether the state court unreasonably applied clearly established federal law, this court reviews the state habeas

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[11] The court reaches the same conclusion regarding counsels' decision not to cross-examine each of the State's other trial witnesses. Because the court's reasoning applies to them uniformly, it will not be repeated at length.

court's ultimate legal conclusion, not its reasoning or written opinion. The state habeas court concluded that Dunagan's counsel engaged in sound trial strategy by focusing on Khan's misidentification of Dunagan at trial. This conclusion is not objectively unreasonable for the reasons discussed above concerning Khan.

Moreover, Kubala steadfastly identified Dunagan and stated that he did not wear a mask. He identified Dunagan in a photo array, in a pretrial hearing, and during trial. When questioned during the pretrial hearing, he adhered to his identification of the suspect behind the counter as having a thin mustache and not wearing a bandana. He repeated this testimony at trial. There is no reason to conclude that, during a cross-examination intended to highlight differences between Kubala's and Khan's identification, Kubala would have varied from his unflagging identification of Dunagan. Moreover, such an examination could have served to bolster Khan's arguably tenuous testimony. It was well within the range of acceptable strategy not to give Kubala the opportunity to reinforce his identification of Dunagan. Instead, as the court recounts below, counsel opted through closing argument to challenge Kubala's motives and his ability to identify Dunagan accurately after the passage of 18 months and after observing him only for a few seconds. This trial tactic did not require undertaking a cross-examination that presented the risk of highlighting unfavorable identification evidence.

Thus, although defense counsel could have attempted to establish through cross-examination that Khan and Kubala had identified different persons as the shooter and that Khan's ability to identify the shooter was impeded by a bandana, this court cannot say that the state habeas court unreasonably applied clearly established law to conclude that the strategic choice to jettison this and other approaches, to focus instead

on Khan's faulty testimony, and to challenge the reliability of Kubala's identification fell outside the range of acceptable strategic choices.

The closing arguments that Baraka and Bush presented on Dunagan's behalf reflect the strategic choice made in this case. Baraka sought to challenge the weight of the State's evidence as a whole, including Kubala's ability to identify Dunagan after an 18-month interval and Khan's misidentification of the shooter during her trial testimony. He argued that Kubala had only six or seven seconds to observe Dunagan and yet was supposedly able to identify him 18 months later. Tr. 7:56. Baraka challenged the accuracy of the composite sketch draw from Kubala's identification, asserting that it did not "even closely look like him." *Id.* at 57. He then questioned Kubala's in-court identification based on the likelihood that he was looking at the gun pointed at him rather than at the gunman's face. *Id.* at 58. Baraka also contrasted Kubala's ability to observe the robbers with Khan's. He emphasized that Khan was present in the store much longer than was Kubala, that she saw both men, and that she testified she could not identify Dunagan. *Id.* He then compared her testimony to Kubala's, arguing that the evidence was insufficient to convict Dunagan beyond a reasonable doubt. *Id.* at 58-59.

Baraka then turned to Khan's testimony, arguing that it had completely changed from the time of the incident. *Id.* at 59. He emphasized first that she had identified the wrong person. *Id.* He then argued that this mistake "was bad enough[,]" but her attempts to clear up her error showed that she had perjured herself, *id* at 59-60. Baraka argued that, on the basis that she was scared, she falsely accused an innocent trial spectator of capital murder rather than simply say she did not see the person in the courtroom. *Id.* at 60. He also

questioned whether she was scared, given that Dunagan was locked up and no one had called or bugged her. *Id.*

Baraka then relied on the absence of physical evidence to tie Dunagan to the crime scene, pointing out that the jury only had Kubala's testimony on which to rely. *Id.* at 60-61. He called into question the accuracy of Kubala's physical description of Dunagan, comparing it to the defendant himself. *Id.* at 61-62.

After Baraka concluded co-counsel Bush presented argument. She addressed the issue of reasonable doubt, pointing out that Kubala was a friend of Ali and Khan and had a desire to see someone pay for the crime. *Id.* at 63. She questioned whether he could identify Dunagan in a photo line-up after having observed him only six or seven seconds dtiring the commission of the crime. *Id.* at 64. Bush also relied on the fact that Dunagan had cooperated with police and had nothing to hide. *Id* at 65.

Bush also highlighted that Khan had given a statement in which she recounted that there was one gun, but she testified at trial that there were two. *Id.* at 66. After pointing to the absence of fingerprint evidence, she then focused on Khan's demeanor as a witness, arguing that it belied her assertion that she had misidentified the shooter because she was scared, and asserting that the State had rehabilitated her the next day by asking a leading question. *Id.* at 66-67. Bush attempted to persuade the jury that this should give rise to reasonable doubt about the identity of the shooter. She then turned to Kubala's identification of Dunagan, questioning its reliability. *Id.* at 67-68. Bush concluded by pointing out that the jury was obligated by law to acquit Dunagan unless it found beyond a reasonable doubt that he was guilty. *Id.* at 68-69.

As reflected in their closing arguments, Dunagan's counsel made a strategic choice to use the testimony developed in the State's case-in-chief, supplemented by cross-examination of the eyewitness to the shooting, as the basis to argue that the jury should have a reasonable doubt regarding their client's guilt and thus acquit him. Dunagan has failed to show that the state habeas court unreasonably applied federal law to conclude that his counsel rendered effective assistance by following a sound and tactical trial strategy. Accordingly, he has not demonstrated that he meets the first prong of the *Strickland* test, and the court need not address the prejudice prong. *See Strickland*, 466 U.S. at 697; *Carter,* 131 F.3d at 463 ("Failure to prove either deficient performance or actual prejudice is fatal to an ineffective assistance claim."). The court denies Dunagan's petition for habeas corpus on this ground.

IV

Dunagan contends second that he received ineffective counsel because his counsel did not present alibi evidence from Williams, Dunagan's live-in girlfriend, or his parole officer, Mosier.

A

Dunagan argues that his counsel were aware that he was home with Williams at the time of the robbery, waiting for a visit from Mosier, his parole officer. His attorneys hired an investigator who spoke to Williams before trial. She confirmed that Dunagan was at home with her. Dunagan complains that, although Williams was available to testify at trial, his counsel chose not to call her as a witness. He also maintains that his counsel were ineffective for failing to call Mosier to testify about his home visit or to introduce in

evidence parole records that confirmed that Mosier made a home visit the day of the robbery. He posits that, considering the need to cast doubt on the identification testimony of Khan and Kubala, the decision not to present this alibi defense could not have been reasonable.

B

The state habeas court found that "there was a sound tactical reason not to call [Williams] to the stand." St. Hab. Supp. R. 13 (St. Hab. Ct. Find. No. 2). The court also found "that counsel had a sound legal strategy for not presenting evidence in this case and for arguing the issue of misidentification[,]" *Id.* at 14 (St. Hab. Ct. Find. No. 3), "that counsel had sound legal reasoning for handling the case the way he did and for not presenting the testimony of Dawn Williams[,]" *id.*, that her "alibi testimony ... would have been easily attacked for veracity by the State[,]" *id.* at 13 (St. Hab. Ct. Find. No. 1), and that "[t]his testimony would have also opened the door to [Dunagan's] prior conviction for aggravated robbery for which he was currently on parole[,]" *id.* Essentially, the state habeas court concluded that counsels' decision to focus on the misidentification issue (which the court addresses *supra* at § III(B)), combined with concerns that Williams' veracity could easily have been attacked and that Mosier's testimony would have allowed evidence that Dunagan had a prior conviction for aggravated robbery (an offense like the one for which he was then on trial), was strategically and tactically sound.

Baraka testified in his habeas affidavit that he felt it was better to rest rather than to adduce "evidence that did not definitively show [Dunagan] to be not guilty." St. Hab. Supp. R. 17. Concerning Williams, he averred: "[Williams] could have testified that she left [Dunagan] at home with their baby

but again she was not with [Dunagan] during the hour of the robbery." *Id.* Regarding Mosier, Baraka stated: "Even if [Mosier] had testified, he was not with [Dunagan] during the hour that the robbery occurred[.]" *Id.*

The court's prior discussion of the jurisprudence of AEDPA and of ineffective assistance applies equally to Dunagan's second argument and need not be repeated. The state habeas court did not unreasonably determine the facts. It had a basis in the record to find that Dunagan's counsel made a strategic decision after weighing Khan's misidentification of the shooter, the questionable probative value of Williams' and Mosier's testimony, and the risks associated with calling Williams and Mosier as witnesses. The state habeas court's application of clearly established federal law is not unreasonable.

Accordingly, the court denies Dunagan's petition for habeas corpus on this ground.

V

Dunagan asserts as his third ground for relief that his counsel were ineffective for failing to object at trial to certain testimony of Sgt. Patton. The State adduced evidence from Sgt. Patton that he had obtained a photograph of Dunagan from Dallas County "arrest files." Dunagan complains that this testimony disclosed to the jury that he had a prior arrest, and it would not have been admissible had counsel timely objected. The state habeas court did not address this ground explicitly. This court will assume, however, that the state court applied the proper clearly established law and will determine whether its decision was an objectively unreasonable application of that law. *See Schaetzle,* 343 F.3d at 443.

Even if the court assumes *arguendo* that a decision by the state habeas court finding that counsel's performance was not deficient would have been an objectively unreasonable application of *Strickland*, Dunagan must still demonstrate an objectively unreasonable application of the prejudice prong of the test. To demonstrate prejudice, "he must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Williams*, 529 U.S. at 391 (internal quotation marks deleted)(quoting *Strickland*, 466 U.S. at 688, 694).

Dunagan has made no effort to do so. *See* P. Mem. at 12. He offers nothing more than the conclusory assertions that "[t]he prejudice ... from his trial attorneys' deficient representation is clear[,]" and that "[t]here is no sound trial strategy for not objecting to inadmissible extraneous offense evidence that served only to prejudice [Dunagan][.]" *Id.* The state habeas court's application of clearly established federal law is not unreasonable. Accordingly, the court denies Dunagan's habeas petition on this ground.

Dunagan's habeas petition is DENIED, and this action is DISMISSED with prejudice by judgment filed today.

SO ORDERED.

April 28, 2004.

/s/ _____
Sidney A. Fitzwater
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 3-03-CV-0374-D

[Filed May 19, 2004]

GREGORY BRUCE DUNAGAN, Petitioner,

v.

DOUG DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.

ORDER

Petitioner's May 19, 2004 application for certificate of appealability is denied. For the reasons set forth in the court's memorandum opinion and order filed April 28, 2004,* and

* In his application, petitioner maintains, *inter alia,* that the court "ignored" *Beltran v. Cockrell,* 294 F.3d 730 (5th Cir. 2002), in its memorandum opinion and order. The court did not cite *Beltran* because it is a pre-AEDPA case and is clearly distinguishable on

after considering his motion, the court concludes that he has not made a substantial showing of the denial of a constitutional right.

SO ORDERED.

May 19, 2004.

/s/_____
Sidney A. Fitzwater
UNITED STATES DISTRICT JUDGE

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that basis.